

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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 FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of)
)
 Amendment of Section 73.622(b),)
 Table of Allotments,)
 Digital Television Broadcast Stations.)
 (Boca Raton, Florida))

MM Docket No. 00-138
RM-9896

To: Chief, Video Services Division

COMMENTS OF SHERJAN BROADCASTING CO., INC.

1. These Comments are filed on behalf of Sherjan Broadcasting Co., Inc. ("Sherjan") in response to the Commission's *Notice of Proposed Rule Making* ("NPRM") in the above-captioned proceeding, DA 00-1797, released August 18, 2000. Sherjan is the licensee of Class A Television Station WJAN-CA, Facility ID 60165, operating on Channel 41 at Miami, Florida.^{1/} The proposed allotment of DTV Channel *40 at Boca Raton would be first-adjacent to WJAN-CA and would result in prohibited contour overlap with WJAN-CA. Because the proposal would infringe on a Class A station and was not adopted prior to the date on which Sherjan filed its Class A application, it is unacceptable and must be rejected. Rejection is required notwithstanding the "settlement agreement" between one of the proponents and Guenter Marksteiner ("Marksteiner"), because a channel change for WPPB-TV is not required to surmount the "technical problems"

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^{1/} Sherjan's Class A application was granted on July 18, 2000, under File No. BLTTCA-20000616AAQ.

contemplated by the Community Broadcasters Protection Act ("CBPA")^{2/} and is only for the convenience of Marksteiner's secondary Low Power Television ("LPTV") station.

2. The petitioners herein are Palmetto Broadcasters Associated for Communities, Inc. ("Palmetto"), which was then permittee of noncommercial educational station WPPB-TV, Boca Raton, Florida, Facility ID 51349, and Channel 63 of Palm Beach, Inc., a proposed assignee of WPPB-TV. WPPB-TV was subsequently assigned by Channel 63 of Palm Beach, Inc. to The School Board of Broward County, Florida, which is the present licensee of the station.^{3/} WPPB-TV has been assigned DTV Channel *44 in the DTV Table of Allotments. The Proponents seek change that allotment to Channel *40.

3. First, Sherjan will establish that the proposed Channel *40 DTV allotment will result in prohibited contour overlap with WJAN-CA. Section 73.623(c)(5) of the Commission's rules prohibits overlap between the 88 dBu contour of a DTV station with the 74 dBu contour of a Class A television station operating on the upper first-adjacent channel.^{4/} The attached Statement of Carl E. Smith Consulting Engineers establishes that with the 1000 kW/310m facilities proposed in the NPRM,^{5/} not only would the interfering 88 dBu contour of WPPB-DT overlap 64.9% of the area

^{2/} The CBPA is Public Law No. 106-113 and is codified in Section 336(f) of the Communications Act.

^{3/} See File No. BAPET-20000216AAA, granted March 31, 2000. Palmetto and the two subsequent assignees will be referred to collectively as the "Proponent."

^{4/} WJAN-CA's Channel 41 would be first upper-adjacent to WPPB-DT were WPPB-DT to be authorized to operate on Channel *40.

^{5/} These facilities reflect Palmetto's proposal and exceed both the ERP specified for WPPB-TV on Channel 44 in the existing DTV Allotment Table and the facilities proposed by Palmetto in its Channel 44 maximization application, File No. BPEDT-19991208ACM.

and 80.7% of the population within the protected 74 dBu contour of WJAN-CA^{6/} but the overlap would also encompass all of Miami, WJAN-CA's community of license. That overlap is contrary to both the letter and spirit of the rule and the CBPA and cannot be permitted to occur.^{7/}

4. There are two circumstances under the CBPA where WPPB-DT might be given priority over WJAN-CA. The first is if the Channel *40 allotment had been in place in the DTV Allotment Table as of December 9, 1999, the date on which Sherjan filed its certification of Class A eligibility for what was then WJAN-LP.^{8/} The Channel *40 allotment was not in place then; indeed, it was not even requested until Palmetto filed its Petition for Rule Making on February 8, 2000. While the CBPA also protects DTV maximization applications notified by December 31, 1999, and filed by May 1, 2000,^{9/} WPPB-TV's maximization application specified operation on Channel *40, not Channel *44; and there is no statutory or regulatory provision that extends maximization protection, or allows the protection to be ported, to a channel that was not in the DTV Allotment Table at the time when maximization was requested.

^{6/} The prohibited overlap would encompass 701.6 sq. km. out of the 1080.6 sq. km. within WJAN-CA's 74 dBu contour, and 1,352,001 out of 1,674,951 persons that WJAN-CA serves within that area.

^{7/} Section 336(a)(1)(A)(ii) of the CBPA accords primary status to WJAN-CA. Section 73.623(c)(5) of the Commission's rules, discussed above, specifies the parameters of the protection to which WJAN-CA is entitled. The exception that requires WJAN-CA to protect certain full power DTV facilities, contained in Section 73.6013, does not apply here, because WPPB-DT's Channel *40 proposal was not filed or notified by December 31, 1999.

^{8/} See *Establishment of a Class A Television Service*, Report and Order in MM Docket No. 00-10, 15 FCC Rcd 6355 (2000) ("*Class A R&O*") at par. 40, which protects Class A stations "from the date of receipt of an acceptable certification of eligibility."

^{9/} See Section 336(f)(1)(D)(ii) of the Communications Act.

5. Second, if WPPB-DT faced "technical problems" operating DTV facilities on Channel *44 that requiring an "engineering solution" that could not reasonably be achieved without infringement on a Class A station, resolution of those problems might justify infringement on a Class A station's service area under the "safety net" provision of the CBPA.^{10/} But that is not the case either. WPPB-DT has no technical problems on Channel *44 that require a change of channel. Sherjan's Engineering Statement demonstrates that the Channel *44 facilities currently specified in the DTV Allotment Table for WPPB-DT^{11/} would not cause prohibited interference to WJAN-CA, and WPPB-DT has not raised any other technical problems with Channel *44. Even WPPB-DT's pending maximization proposal for 565 kW/311m on Channel *44, would result in only a relatively small overlap of WPPB-DT's interfering 108 dBu contour with WJAN-CA's protected 74 dBu contour -- far less interference than would be caused by the 88 dBu/74 dBu overlap on Channel *40. Thus there is no technical justification from any point of view for moving WPPB-TV to Channel *40.^{12/}

^{10/} See Section 336(f)(1)(D) of the Communications Act and *Class R&O*, at par. 61.

^{11/} These facilities include an ERP of 61.7 kW/310m and are sufficient to replicate WPPB-TV's analog service area.

^{12/} The CBPA does not accord priority to WPPB-DT to resolve technical problems, assuming any existed, beyond replication (a problem WPPB-DT does not face) and the maximization application WPPB-DT has already filed. See Section 336(f)(1)(D) of the Communications Act. Sherjan does argue one way or the other whether WPPB-DT's pending maximization application is grantable on Channel *44, notwithstanding a small amount of interference to WJAN-CA, because that question will be decided in the context of WPPB-TV's DTV application and need not be addressed here. The relevant point in this proceeding is that a move to Channel *40 would make the problem much worse. Therefore, it would create, rather than solve, technical problems and so cannot be accepted under the CBPA's "safety net" provision.

6. In addition, as Sherjan's Engineering Statement demonstrates, operation by WPPB-DT on Channel *40 would worsen predicted interference to WFUN-LP, Channel 48, Miami and Fort Lauderdale, Facility ID 60542, whose certification of eligibility for a Class A license has been accepted by the Commission^{13/} and which is thus protected against interference from a new DTV allotment.

7. There is another element raised in the NPRM, which is Palmetto's "Settlement Agreement" with Marksteiner. Marksteiner is the permittee of a new full power TV station at Stuart, Florida, authorized to operate on Channel 59, Facility ID 83929. Marksteiner has been authorized to construct his new station initially as a DTV station because of interference problems to DTV stations were the station to operate in an analog mode on Channel 59. However, the settlement does not contemplate any change of channel for the Channel 59 DTV station; and indeed, that station requires no channel change to operate in the DTV mode, as it proposes and has been authorized to do.^{14/} As Sherjan's Engineering Statement explains, there is no rule requiring any separation, or prohibiting any contour overlap, between a DTV station on Channel 59 and a DTV station on either Channel *44 or *40. Therefore, whether WPPB-DT operates on Channel *44 or Channel *40 has no impact at all on Marksteiner's Channel 59 station.

8. What does appear to be relevant to Marksteiner is the fate of another station authorized to him, WHDT-LP, Channel 55, Coral Springs, Florida, Facility ID 9614. That station is being displaced by the Channel 55 DTV allotment at West Palm Beach, Florida, to be occupied by

^{13/} See *Certificates of Eligibility for Class A Television Station Status*, Public Notice DA 00-1224, released June 2, 2000.

^{14/} See File No BPCDT-19960920LH, granted April 25, 2000.

WPTV-DT, Facility ID 59443. Marksteiner filed objections to analog applications by WPPB-TV, arguing that a modification and extension of time to construct should be denied because of dilatory conduct by the permittee in constructing that station.^{15/} It appears from those pleadings that his primary objective is to displace WHDT-LP to Channel 44, which is WPPB-DT's original DTV channel; and that is why he entered into an agreement to stop opposing Palmetto's applications if WPPB-DT moved to Channel *40.^{16/} However, the need for a displacement channel for WHDT-LP does not elevate the priority of WPPB-TV's proposal with respect to protection of WJAN-CA. First, WHDT-LP is not a Class A station and cannot be granted a Class A license as long as it remains authorized on Channel 55, which is an out-of-core channel.^{17/} Therefore, it remains a secondary facility, while WJAN-CA is a primary facility. Second, whatever technical problems WHDT-LP may have, the CBPA affords "safety net" protection for only full power DTV stations, not analog or digital LPTV stations. True, the Commission has warned that DTV channel changes should avoid adverse impact on LPTV stations wherever possible,^{18/} However,

^{15/} Marksteiner filed an Informal Objections, followed by a Further Informal Objection filed June 4, 1998. Sherjan also objected to WPPB-TV's modification and extension applications, by Informal Objections filed October 31, 1996. The Commission denied both Marksteiner's and Sherjan's objections by letter of November 12, 1998, Reference 1800E3-JLB, granting WPPB-TV's applications, File Nos. BMPET-19960624KS and BPET-19960628LA.

^{16/} Indeed, Marksteiner has already applied for and received a construction permit to displaced WHDT-LP to Channel 44, File No. BMPTTL-JG0601EX, granted December 24, 1998. There is no indication in the Commission's CDBS database that the Channel 44 facilities have yet been built or licensed. The construction permit does not expire until December 24, 2001.

^{17/} See Section 336(f)(4)(A) of the Communications Act.

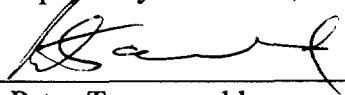
^{18/} In *Advanced Television Systems*, Sixth Report and Order in MM Docket No. 87-268, 12 FCC Rcd 14588, 14671 (1997), the Commission explicitly warned that it would review all requests for modification of the DTV Table for their impact on low power stations" and that proposed

avoiding adverse impact to LPTV stations does not justify wholesale infringement on the service area of a Class A station; and in any event, the same protection policy applies to Class A stations like WJAN-CA. Thus WPPB-DT cannot change channels in a way that would cause interference to WJAN-CA in order to facilitate finding a displacement channel for WHDT-LP.^{19/}

12. In light of the foregoing, Sherjan submits that the proposal in this proceeding must be rejected. It will cause interference to two protected Class A facilities, and none of the exceptions in the CBPA applies. The proposal thus cannot be adopted.

Irwin, Campbell & Tannenwald, P.C.
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Respectfully submitted,


Peter Tannenwald

October 10, 2000

Counsel for Sherjan
Broadcasting Co., Inc.

modifications to the DTV Table of Allotments should "avoid impact on such stations wherever possible."

^{19/} WJAN-CA's viewers may suffer even more interference when WJAN-CA files an application to increase its power to 150 kW ERP, as permitted by Sections 73.6007 and 74.735(a)(2) of the Rules, effective January 15, 2001, to improve its coverage of its own community of license.

ENGINEERING STATEMENT IN
SUPPORT OF COMMENTS
MM DOCKET 00-138
DTV CHANNEL 40 - BOCA RATON, FL

Sherjan Broadcasting Company, Inc.
Miami, FL

October 10, 2000

Prepared For: Mr. Sherwin Grossman
Sherjan Broadcasting Company, Inc.
1520 NW 79th Avenue
Miami, FL 33126

CARL E. SMITH CONSULTING ENGINEERS

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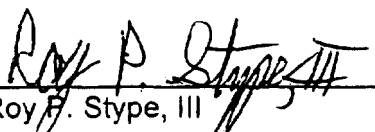
Fig. 2.0 - Detailed Allocation Study - WFUN-LP - Miami, etc., FL
(WPPB-DT Channel 40 Rulemaking Facilities)

ENGINEERING AFFIDAVIT

State of Ohio)
) ss:
County of Summit)


Roy P. Stype, III, being duly sworn, deposes and states that he is a graduate Electrical Engineer, a qualified and experienced Communications Consulting Engineer whose works are a matter of record with the Federal Communications Commission and that he is a member of the Firm of "Carl E. Smith Consulting Engineers" located at 2324 North Cleveland-Massillon Road in the Township of Bath, County of Summit, State of Ohio, and that the Firm has been retained by the Sherjan Broadcasting Company, Inc. to prepare the attached "Engineering Statement In Support of Comments - MM Docket 00-138 - DTV Channel 40 - Boca Raton, FL."

The deponent states that the Exhibit was prepared by him or under his direction and is true of his own knowledge, except as to statements made on information and belief and as to such statements, he believes them to be true.



Roy P. Stype, III

Subscribed and sworn to before me on **October 10, 2000**.



Notary Public

/SEAL/

NANCY A. ADAMS, Notary Public
Residence - Cuyahoga County
State Wide Jurisdiction, Ohio
My Commission Expires Sept. 5, 2005

ENGINEERING STATEMENT

This engineering statement is prepared on behalf of Sherjan Broadcasting Company, Inc., licensee of Class A TV Station WJAN-CA - Miami, Florida. WJAN-CA operates on Channel 41 with a maximum effective radiated power of 101 kilowatts. The Notice of Proposed Rulemaking in MM Docket 00-138 has proposed to substitute DTV Channel 40 for DTV Channel 44 in Boca Raton, Florida, for use by WPPB-DT, at the joint request of the former permittee and a former proposed assignee of WPPB-TV. This engineering statement supports comments in the above referenced DTV rule-making proceeding and documents that the proposed Channel 40 DTV facilities fail to provide the required protection to WJAN-CA and also to one other LPTV station which has been granted a Certificate of Eligibility for Class A status.

WPPB-DT's present DTV allotment authorizes operation on Channel 44 with a maximum effective radiated power of 61.7 kilowatts at 310 meters above average terrain utilizing a directional pattern to replicate the coverage of their presently licensed Channel 63 analog operating facilities. WPPB-DT also has pending a maximization application (BPEDT-19991028ACM) which specifies DTV operation on Channel 44 from their present transmitter site with a maximum effective radiated power of 565 kilowatts at 311 meters above average terrain utilizing a directional antenna. The WPPB-DT rulemaking petition specifies DTV operation on Channel 40 from their present transmitter site with a nondirectional effective radiated power of 1000 kilowatts at 310 meters above average terrain.

The WPPB-DT rulemaking petition indicates that it has been filed to resolve a long standing dispute between the licensee of WPPB-TV and Gunter Marksteiner, who was an applicant for, and is now the permittee of a new DTV station on Channel 59 in

Stuart, Florida and implies that the proposed channel substitution is necessary in order to permit a construction permit to be granted for Mr. Marksteiner's new DTV broadcast facility in Stuart¹. Reviewing the rulemaking petition and the underlying settlement agreement in detail, however, shows that there is not, and never has been a technical conflict between WPPB-DT's Channel 44 DTV allotment and Mr. Marksteiner's Channel 59 application for Stuart, either as an analog facility or as a DTV facility². Further evidence of this is provided by the fact that the construction permit for Channel 59 in Stuart was granted prior to the resolution of this rulemaking proceeding. Mr. Marksteiner, however, is also the licensee of WHDT-LP - Coral Springs, Florida, which is licensed to operate on Channel 55. WHDT-LP, which has been displaced by the Channel 55 DTV allotment for WPTV-DT - West Palm Beach, Florida, had filed displacement applications for analog operation on Channel 63 (WPPB-TV's analog channel) and also for DTV operation on Channel 44 (WPPB-DT's allotted DTV channel), while also proposing to change its community of license to Miami-Fort Lauderdale, Florida. The Channel 44 DTV displacement application for WHDT-LP was subsequently granted by the FCC. Accordingly, it appears that the true motive of this settlement agreement is to attempt to protect Channel 44 as a displacement channel for WHDT-LP by requiring WPPB-DT to pursue Channel 40 for DTV operation.

The WPPB-DT rulemaking petition was filed with the FCC on February 8, 2000, more than a month after WJAN-CA filed its certification of eligibility for Class A status. Accordingly, since WPPB-DT has not claimed that the proposed channel change is

¹This application was originally filed as an application for a new analog broadcast station and requested a waiver of the FCC's filing freeze, but was amended to specify DTV operation to eliminate conflicts with the DTV allotment table.

²The FCC Rules contain no protection requirements in either direction between a DTV station and either an analog or DTV station operating on its upper 15th adjacent channel.

necessary to overcome unforeseen problems in implementing DTV operation with facilities which at least replicate its present analog service area, WJAN-CA is entitled to protection from the facilities proposed in this rulemaking petition. Section 73.623(c)(5) of the FCC Rules defines the protection criteria which must be met by a DTV broadcast facility with regard to a Class A TV facility. This rule section specifies that there can be no overlap between the 88 dBu contour of a DTV station operating on Channel 40 and the 74 dBu contour of a Class A TV station operating on Channel 41. It also specifies that there can be no overlap between the 108 dBu contour of a DTV station operating on Channel 44 and the 74 dBu contour of a Class A TV station operating on Channel 41. Figure 1.0 is a map exhibit depicting the WJAN-CA 74 dBu contour in relation to the 88 dBu contour for the Channel 40 facilities proposed in the WPPB-DT rulemaking petition and the 108 dBu contours for the WPPB-DT Channel 44 DTV allotment facilities and the WPPB-DT Channel 44 maximization application facilities. As shown in this figure, there is no overlap between the 108 dBu contour for the WPPB-DT Channel 44 DTV allotment facilities and the WJAN-CA 74 dBu contour, but there is a slight bit of prohibited overlap between the 108 dBu contour for the WPPB-DT Channel 44 DTV maximization application and the WJAN-CA 74 dBu contour³. As shown in this figure, however, the proposed WPPB-DT Channel 40 DTV facilities would significantly increase the area of prohibited overlap caused to WJAN-CA from that which occurs for their Channel 44 maximization application. This prohibited overlap would encompass the entire city of Miami, WJAN-CA's community of license, and would include 64.9% (701.6 square kilometers) of the land area and 80.7% (1,352,001 persons) of the popu-

³This slight bit of prohibited overlap from the WPPB-DT Channel 44 maximization application facilities is permitted by Section 73.623(c)(5) of the FCC Rules since it was created by the facilities proposed in a maximization application filed prior to December 31, 1999.

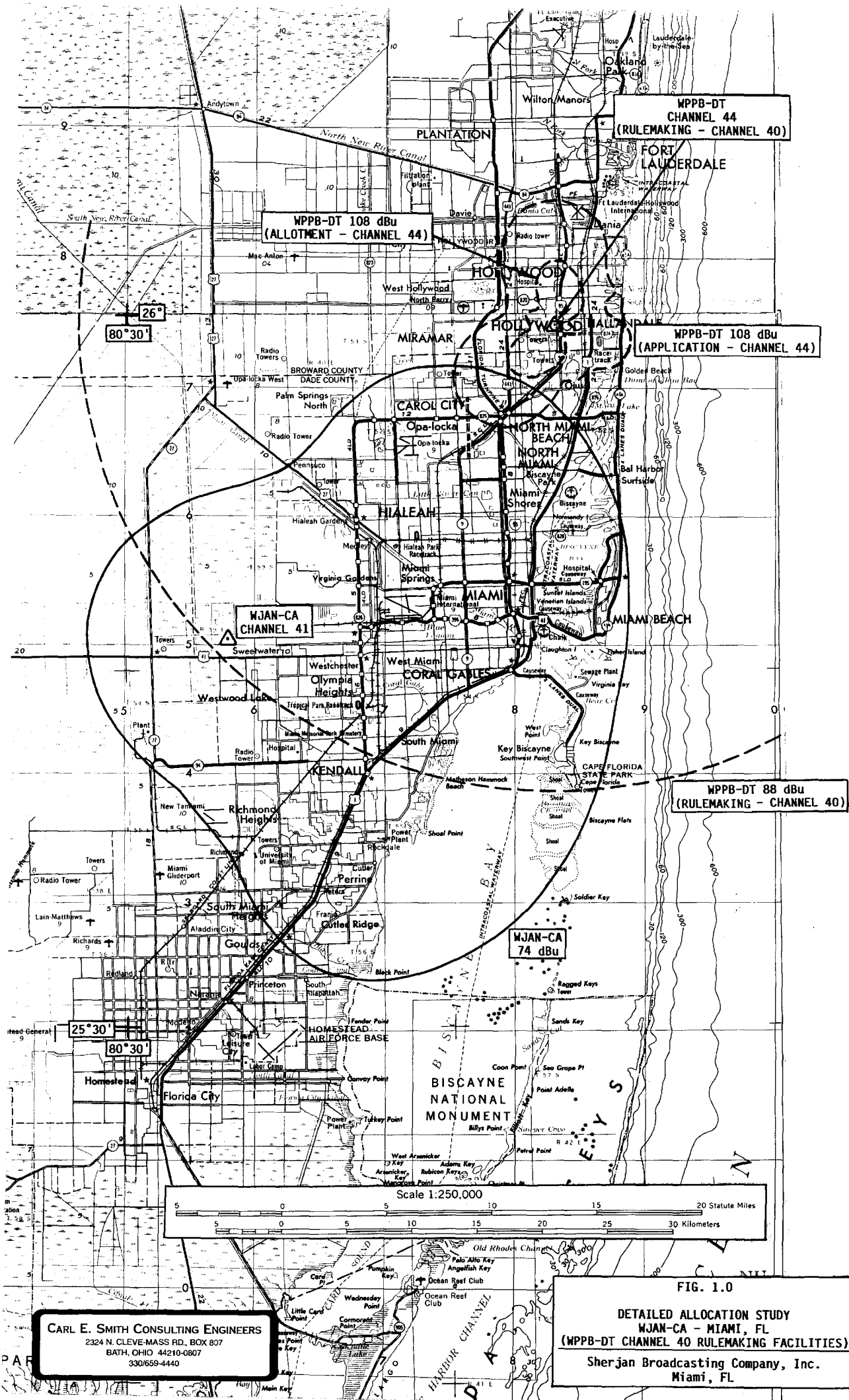
lation within the WJAN-CA 74 dBu protected contour. Thus, the facilities proposed in this rulemaking petition fail to provide the required protection to WJAN-CA pursuant to Section 73.623(c)(5) of the FCC Rules.

There is also one other LPTV station which has been granted a Certificate of Eligibility for Class A status which is entitled to protection consideration from these proposed Channel 40 DTV facilities. This is WFUN-LP - Miami, etc., Florida, which operates on Channel 48 and filed its certification of eligibility for Class A status on December 22, 1999. Section 73.623(c)(5) of the FCC Rules defines the protection criteria which must be met by a DTV broadcast facility with regard to a Class A TV facility. This rule section specifies that there can be no overlap between the 106 dBu contour of a DTV station operating on Channel 40 and the 74 dBu contour of a Class A TV station operating on Channel 48. It also specifies that there can be no overlap between the 108 dBu contour of a DTV station operating on Channel 44 and the 74 dBu contour of a Class A TV station operating on Channel 48. Figure 2.0 is a map exhibit depicting the WFUN-LP 74 dBu contour in relation to the 106 dBu contour for the facilities proposed in the WPPB-DT rulemaking petition and the 108 dBu contours for the WPPB-DT Channel 44 DTV allotment facilities and the WPPB-DT Channel 44 maximization application facilities. As shown in this figure, the 108 dBu contours for both the WPPB-DT Channel 44 DTV allotment facilities and the WPPB-DT Channel 44 maximization application facilities are totally encompassed within the WFUN-LP 74 dBu contour⁴. As shown in this figure, however, the proposed WPPB-DT Channel 40 DTV facilities would significantly increase the area of prohibited overlap caused to WFUN-LP from that which occurs for either their Channel 44 allotment or their

⁴This slight bit of prohibited overlap from the WPPB-DT Channel 44 allotment and maximization application facilities is permitted by Section 73.623(c)(5) of the FCC Rules since it was created either by the initial DTV allotment for WPPB-DT or by the facilities proposed in a maximization application filed prior to December 31, 1999.

Channel 44 maximization application. Thus, the facilities proposed in this rulemaking petition also fail to provide the required protection to WFUN-LP.

Based on the above information, the Channel 40 DTV facilities proposed in the WPPB-DT rulemaking petition fail to provide the required protection to WJAN-CA, which is a licensed Class A TV facility, and to WFUN-LP, which has been granted a Certificate of Eligibility for Class A TV status. Since WPPB-DT has not been able to, and cannot, document that this proposed DTV channel change is necessary to overcome technical obstacles to implementing DTV service with facilities at least replicating its present analog service area, this failure to provide the required protection to Class A TV facilities is fatal to this proposal and it must be denied.



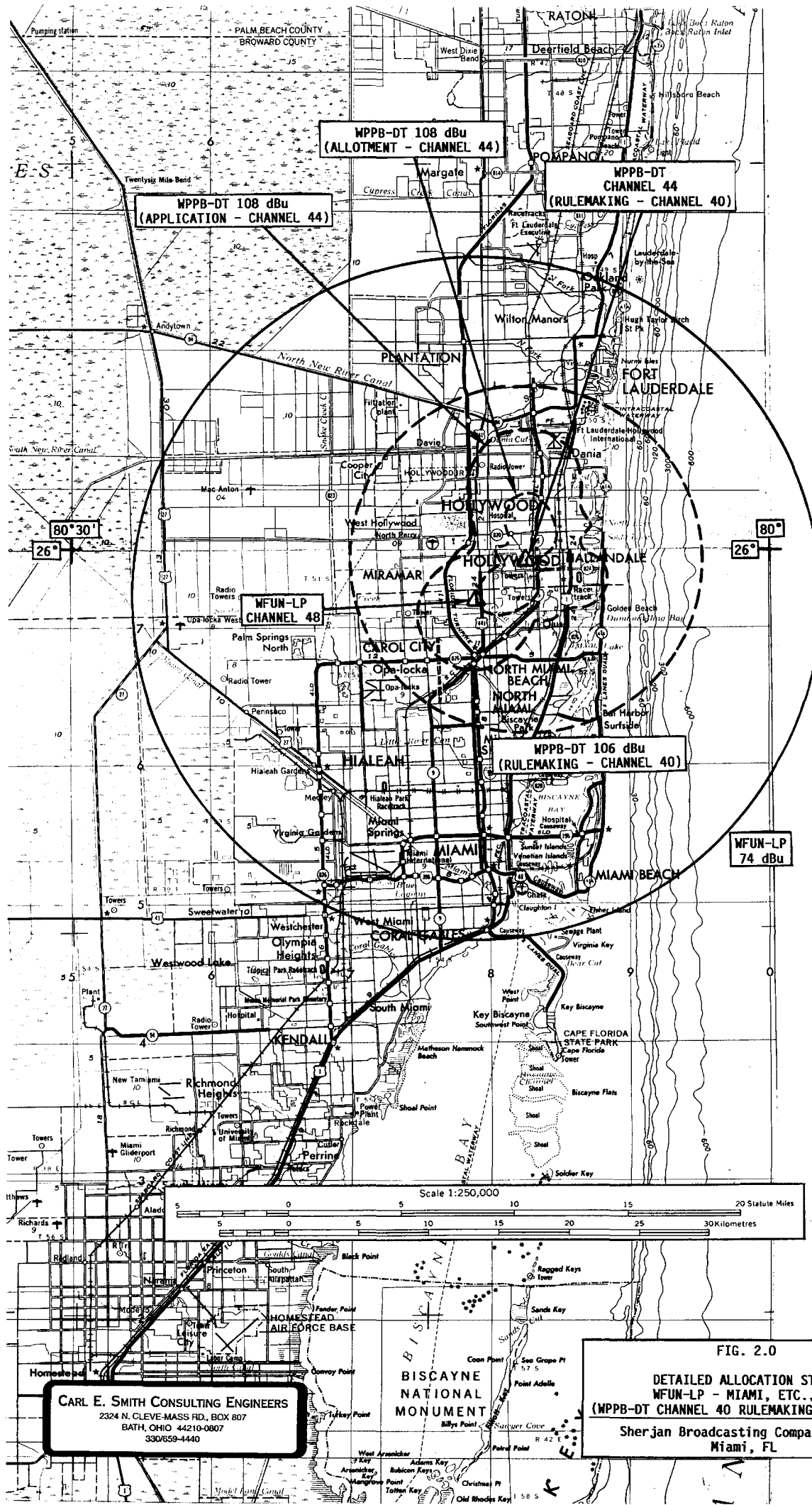


FIG. 2.0
 DETAILED ALLOCATION STUDY
 WFUN-LP - MIAMI, ETC., FL
 (WPPB-DT CHANNEL 40 RULEMAKING FACILITIES)
 Sherjan Broadcasting Company, Inc.
 Miami, FL

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CERTIFICATE OF SERVICE

I, Jennifer N. Reyes, do hereby certify that I have, this 10th day of October, 2000, caused to be sent by first class United States mail, postage prepaid, copies of the foregoing "Comments of Sherjan Broadcasting Co., Inc." to the following:

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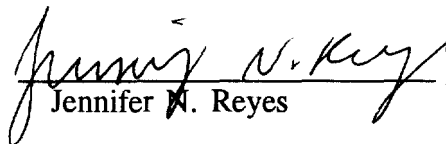
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